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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 33

ARTHUR C. BROWN

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinions were filed by the District Court or the Circuit Court of Appeals.

JURISDICTION

The case came before this Court on certificate from the Circuit Court of Appeals for the Seventh Circuit, pursuant to Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. Thereafter, this Court ordered that the entire record be certified to it, "so that the whole matter in controversy may be considered by the Court"

(R. 1.), and the case is now here as if on writ of error to the District Court.

QUESTIONS PRESENTED

In this, a criminal contempt proceeding against the secretary of an unincorporated association for disobedience of a *subpœna duces tecum* requiring production before a grand jury of correspondence and records of the association, the questions are:

1. Whether the secretary was justified in refusing production because the subpoena was directed to the association and not to him personally, although it was followed by an order of the court directed to him personally, requiring him to obey it.

2. Whether the subpoena was so indefinite in its description of the documents required and called for so many as to violate the Fourth Amendment, prohibiting unreasonable searches.

3. Whether the secretary of the voluntary association justified his disobedience of the subpoena and order, requiring him to produce records of the association in his custody, by claiming their production would incriminate him, where he failed to show that he was a member of the association or had any proprietary interest in the papers, and also failed to show that the members of the association were not corporations.

STATEMENT

The plaintiff in error is seeking to reverse a judgment of the United States District Court for the Northern District of Illinois adjudging him in con-

tempt for refusal to comply with a subpœna duces tecum and an order of the court, requiring him, the secretary of a voluntary association, known as the National Alliance of Furniture Manufacturers, to produce certain books and papers of that organization before a grand jury. The questions certified were:

> Question 1. Can the court compel through a subpœna duces tecum the production of the books and papers of a voluntary unincorporated association, over its protest?
>
> Question 2. Would the answer to Question No. 1 be affected if it appear that the members of such voluntary unincorporated association were all corporations?
>
> Question 3. Would the fact that the secretary of such voluntary unincorporated association is also a member of such association, entitle him to claim the protection of the Fourth or Fifth Amendment to the Constitution, notwithstanding the subpœna called for the papers that belonged to and were in the possession of the said voluntary unincorporated association?

The case is now here as if on appeal from or writ of error to the United States District Court, and the entire record which has been certified up, presents the case in a somewhat different aspect from that it bore on the statement accompanying the certified questions.

The United States District Court for the Northern District of Illinois issued a *subpœna duces tecum* without *ad testificandum* clause (R. 1), di-

rected to "National Alliance of Furniture Manufacturers, Grand Rapids Savings Bank Building, Grand Rapids, Michigan," commanding it to appear before the Federal grand jury in Chicago and produce:

> All letters or copies of letters, telegrams or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporations, partnerships, and individuals, and their respective officers and agents) during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to—
>
> (a) General meetings of Alliance.
>
> (b) Zone meetings of Alliance members.
>
> (c) Costs of manufacture.
>
> (d) Grading of various types of case goods.
>
> (e) Issuing new price lists.
>
> (f) Discounts allowed on price lists.
>
> (g) Exchanging price lists.
>
> (h) Maintaining prices.
>
> (i) Advancing prices.
>
> (j) Reducing prices.
>
> (k) Rumors of charges of price cutting.
>
> (l) Discounts, terms and conditions of sale, etc.

(m) Curtailment of production.

(n) The pricing of certain articles or suits of furniture by W. H. Coye.

(o) Cost bulletins.

(p) Intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions.

(q) Conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y.

(r) Manufacturers maintaining a fair margin of profit between cost prices and selling prices.

This subpoena was served upon the Association by service upon the plaintiff in error, Arthur C. Brown, who was the secretary of the Association. (R. 3.) The grand jury was then engaged in an inquiry concerning violations of the antitrust laws of the United States by the furniture manufacturers. (R. 4.)

It appears that National Alliance of Furniture Manufacturers is "the name assumed by a voluntary organization of furniture manufacturers and that said organization is not a corporation either *de jure* or *de facto*." (R. 5.) It does not appear from the record whether the members of the association were corporations, individuals, or copartnerships, although the subpoena was drawn to in-

clude correspondence with members of the association and of its predecessor "including corporations, partnerships, and individuals." (R. 2.) For all that the record discloses they may all have been corporations. It does not appear that the plaintiff in error, Brown, was a member of the association, or that he had any proprietary interest in it, or in its books or papers described in the subpoena, or that he was anything other than a salaried employee or agent.

Brown appeared before the grand jurors (R. 3) without producing any of the papers described in the subpoena and refused to say anything about the matters mentioned in the subpoena unless he should first be subpenaed and sworn, at the same time producing and reading to the grand jurors a statement as follows (R. 3):

> GENTLEMEN OF THE GRAND JURY: There has been served upon me a subpoena dated July 13, 1925, ordering National Alliance of Furniture Manufacturers to appear on July 17, 1925, before your honorable body in Chicago.
>
> There is no such person or entity as National Alliance of Furniture Manufacturers which is capable of being served with a subpoena or of appearing here in answer to one. I have appeared here today, in deference to your official position, to inform you of that fact.

He "refused to say, when asked, whether his refusal to comply with said subpoena was because

so to do would incriminate him" (R. 4), thus expressly declining to assert the constitutional privilege. He was then presented to the court as a contumacious witness, and, in response to the presentment by the grand jury, filed an answer (R. 4), in which he set forth that he had stated to the grand jury that there was no such entity as National Alliance of Furniture Manufacturers capable of being served with a subpoena and that he had declined to answer as he had not been subpoenaed; he alleged that the matter under investigation by the grand jury was the same matter as had been investigated by a previous grand jury, which had returned an indictment against him which was still pending. He further stated (R. 6) that as the Alliance was not a corporation, to compel him, then under indictment, to produce the documents in his possession in response to the subpoena "would be to disregard his constitutional rights, privileges and immunities, to compel him to produce evidence against himself, in violation of Amendment V to the Constitution and to submit to an unlawful search and seizure in violation of Amendment IV to the Constitution in that said subpoena fails to show that the documents described therein are important or material, that said subpoena is a blanket command * * * and that said subpoena is not a bona fide attempt to obtain evidence * * *, but is and constitutes a fishing expedition * * * undertaken in the hope that evidence may be discovered which can be used against him, the said

Brown, on his trial under the said indictment or under a new indictment." No claim of constitutional privilege was made before the grand jury, and it was first made before the court in the contempt proceeding.

The court thereupon made an order reciting that no sufficient excuse had been presented for failure to produce before the grand jury the documentary evidence called for, and directing

> said Arthur C. Brown forthwith to appear before said grand jury in obedience to said subpoena and there produce the evidence called for in said subpoena and mentioned in said presentment, whether or not said grand jury sees fit to administer an oath. (R. 7.)

There are provisions of law which grant immunity from prosecution under antitrust laws, on account of any matter concerning which he may produce evidence, "to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." (Act of February 25, 1903, c. 755, 32 Stat. 854, 904, as amended by the Act of June 30, 1906, c. 3920, 34 Stat. 798.) The production of the documents without being sworn would have left the plaintiff in error without immunity.

After the order was entered requiring him to appear before the grand jury and produce the documents without being sworn Brown went again before the grand jury (R. 7) and again refused to

produce the documents. What occurred before the grand jury the second time is only disclosed in the second presentment for contempt, which states that he again failed and refused to comply with the requirements of the subpoena unless "subpoenaed and sworn." Being brought before the court again, judgment was entered adjudging him in contempt and directing that he be imprisoned for "and during the period of thirty days, or until he complies with the requirements of said subpoena."

He obtained stay of execution and sued out a writ of error from the Circuit Court of Appeals. His assignments of error (R. 11) are very general, and state merely that the District Court erred in finding that he had no excuse for refusal to produce the documents, and erred in adjudging him guilty and ordering him imprisoned. No reference is made in the assignments to the Constitution, and they amount to nothing more than a general statement that the court erred in adjudging him in contempt of court and ordering him imprisoned.

We construe the judgment as intended to be punitive rather than merely coercive, and as imposing on Brown punishment by imprisonment for thirty days, with the opportunity, which he might lose if he did not avail himself of it before adjournment of the grand jury, of shortening the term by producing the papers. So construing the judgment, the case has not become moot by adjournment of the grand jury. If the judgment be treated as coercive, and be construed merely to require the

imprisonment of the witness until he should testify, but not exceeding thirty days, then this case became moot by adjournment of the grand jury, as it is settled that if a contumacious witness is ordered confined until he testifies, he may not be held in custody after the tribunal before which he is required to testify has adjourned.

SUMMARY OF ARGUMENT

I. A *subpoena duces tecum* directed at a voluntary association is valid. Such an association is susceptible of being sued, and having process served on it. The secretary and custodian of its records had no right to refuse their production merely because the subpoena was not directed at him personally. This point is not really in the case, because, before Brown was adjudged guilty of contempt, he was ordered by the court which issued the subpoena to appear before the grand jury and produce the documents, and this was equivalent to the issue of a written subpoena directed at him.

II. There was not an unreasonable search and seizure in the sense that the subpoena was too broad and too indefinite or involved a general search or fishing expedition in the books and papers of the Association. The grand jury was investigating violation of the antitrust laws, the subpoena was limited to papers and documents written within a reasonable period and described them with reasonable certainty, and it sufficiently appeared from

their description that they related to the matter under investigation.

III. Assuming that the plaintiff in error properly claimed his constitutional privilege against giving incriminating evidence by the steps he took before the grand jury and in the District Court, and that the point is sufficiently raised by his assignments of error, the question then arises whether an individual who is custodian of the records of a voluntary association may decline to produce them on the ground that they tend to incriminate him. An officer or agent who has custody of the records of a corporation has no right to refuse their production because they tend to incriminate him, but the reason for this rule, as disclosed in the decisions of this Court, is that the corporation receives a charter and grant of special privileges from the State and is a creature of the State, which has a visitatorial power over it. The situations of corporations and voluntary associations do not seem to be analogous in this respect, as the associations are not created by or chartered by the State, and receive no special privileges from the State unless the right to sue and be sued in the firm name be considered such, and are not subject to a visitatorial power. We are not prepared to assert, therefore, that the lack of privilege in the case of a custodian of corporate records exists always in the case of a custodian of the records of a voluntary association. If all the members of the association are corporations, the individual custodian of the association

records has no privilege, and it may well be that if some of the members of the association are corporations and have a proprietary interest in the association's records, the custodian is not privileged merely because he or some individual member of the association would be incriminated. In the present case, the burden was on this plaintiff in error to show an excuse for disobedience of the subpoena and order of the court. He failed to sustain the burden in failing to show that he was a member of the association or that the members of the association were not all corporations.

ARGUMENT

I

THE SUBPŒNA WAS NOT INVALID BECAUSE DIRECTED AT A VOLUNTARY ASSOCIATION

The principal contention of the plaintiff in error has been that a *subpœna duces tecum* directed at a voluntary association was ineffective and invalid, and that to require him to produce the association's records the subpœna should have been directed to him personally. It has been held, of course, that a *subpœna duces tecum* directed at a corporation without naming any individual is sufficient. (*Wheeler* v. *United States*, 226 U. S. 478.) The antitrust laws contemplate that unincorporated trade associations shall be treated as entities, may be served with process, and may be indicted and prosecuted. (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344.)

The State of Michigan, in which this association appears to have been located, has statutes providing that an action may be brought by or against an unincorporated voluntary association composed of five or more members, in the name by which it is known, and that process "against a * * * partnership, association, or unincorporated voluntary association may be served upon any officer, * * * trustee, or agent thereof." (Compiled Laws of Michigan, 1915, Vol 3, Sections (12363) and (12432).)

A *subpœna duces tecum* directed at a voluntary association, served upon the secretary, who is custodian of the papers, should be considered sufficient, but the point is not presented by this record. Before the plaintiff in error was adjudged guilty of contempt he was brought before the court which had issued the subpœna, and the court, by written order, then and there directed him personally to go before the grand jury and produce the records described in the *subpœna duces tecum*. This was the equivalent of a *subpœna duces tecum* directed at him. He was not adjudged in contempt until he had disobeyed the order, and that disobedience, not excused, formed a sufficient basis for contempt proceedings, and, if the original subpœna were defective in not naming him personally, the defect was thus remedied.

II

THERE WAS NOT AN UNREASONABLE SEARCH AND SEIZURE IN THE SENSE THAT THE SUBPŒNA WAS TOO BROAD OR TOO INDEFINITE

One of the objections of the plaintiff in error to the validity of the subpœna is that it caused an unreasonable search in that it called for too many papers, not specifically described, and not shown to be related to the matter under investigation. None of these objections are well founded. The grand jury was engaged in an investigation of alleged violations of the antitrust laws by the furniture manufacturers. The letters and telegrams called for were limited to those sent between January 1, 1922, and June 15, 1925, and the matters to which they related were specifically set forth in the subpœna (R. 2), and included such matters as meetings of the Alliance, costs of manufacture, exchanging price lists, maintaining prices, cost bulletins, and margins of profit. The specific description of the subject matter of the correspondence called for shows that the documents were material to the matter under investigation.

The case is not like *Hale* v. *Henkel*, 201 U. S. 43, chiefly relied upon by the plaintiff in error. The description of the papers called for in the *Hale* case was very indefinite and without specification as to subject matter, and called generally for the books and papers of a corporation actively engaged in commerce in such a way that their production would have interrupted the corporation's business.

In *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, where a notice to produce had been issued by a grand jury directed to the corporation calling for the books and papers concerning any dealings or business between the parties named between January 1, 1904, and October, 1906, this Court said (p. 554):

> But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so sweeping in its reach as in the case of *Hale* v. *Henkel*, *supra*.

See also *Wilson* v. *United States*, 221 U. S. 361.

III

PLAINTIFF IN ERROR FAILED TO SUSTAIN THE BURDEN OF SHOWING JUSTIFICATION FOR REFUSAL TO PRODUCE BY FAILING TO SHOW THAT HE WAS A MEMBER OF THE ASSOCIATION AND THAT ITS MEMBERS WERE NOT CORPORATIONS

It has been held that an officer of a corporation or other person having custody of a corporation's records may not refuse to produce them on the ground that to do so would incriminate him, and the question here is whether there is analogy between a voluntary association and a corporation which brings the same rule into operation and requires the custodian of an association's records to produce them, notwithstanding their production and his vouching for them by production, may incriminate him. To ascertain whether the rule in the case of a corporation's records is applicable to the records of voluntary associations, it is necessary to inquire into the reasons advanced for the rule that a corporation's records must be produced in such cases. An examination of the decisions of this Court shows that the rule which has been announced in respect of production by the custodian of the records of a corporation is grounded on the facts that a corporation is created and chartered by the State and receives a grant of corporate privileges and franchises from the State, and there is a reservation of visitatorial power which allows the State at all times to examine the corporation's records, to inquire whether it is violating its charter or the

law. In this respect corporate records are like public records, the custodian of which may not refuse to produce them because of the Fifth Amendment.

In *Wilson* v. *United States*, 221 U. S. 361, the individual custodian of corporate records was required to produce them, notwithstanding the production would incriminate him, for the reason that the corporation had no privilege and its records were open to inspection by the State, whose right could not be defeated by entrusting the possession of the records to an individual. It was stated that the visitatorial power may be availed of by the National Government where the corporate activities are in a domain subject to the powers of Congress. The Court quoted from *Hale* v. *Henkel*, *supra*, as follows (p. 383):

> "Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his consitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to di-

vulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty

> inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

See also *Essgee Co.* v. *United States*, 262 U. S. 151; *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478.

It does not appear that any reason heretofore assigned by this Court for the rule applicable to records of a corporation exists in the case of a voluntary association or copartnership.

The state of the record in this case may be such that further discussion of this subject is unnecessary. In the statement, attention has been called to the fact that plaintiff in error never has stated that the documents called for would tend to incriminate him. He expressly refused to make such an assertion or to claim any constitutional privilege

before the grand jury. His emphasis has been on the fact that the subpoena did not name him personally and that such a writ directed to a voluntary association was void and ineffective. His assignments of error contain no reference to the constitutional question. We mention these things not to claim that the question of privilege is not properly before the Court, but to emphasize the loose way the point has been dealt with. Passing all this, his case fails because he did not show that he was a member of the association or had any proprietary interest in the documents, or that any of its members were partnerships or individuals entitled to assert the constitutional privilege. For all that the record shows, all of the members of this association were corporations. It is unlikely that all of them were individuals. If the individual custodian of books and papers owned by a corporation may not refuse to produce them on the ground that they would incriminate him, certainly the custodian of the records of a voluntary association, all of whose members are corporations, may not successfully assert the privilege. If all the members of an association are corporations, the association's records should be held to have the same status as corporate records, and to be subject to examination by the public authorities, under the rules laid down in *Hale* v. *Henkel*, *supra*, and other cases. It may also be urged with reason that if some of the

proprietors or members of the association are corporations, the records of the association are not privileged as to them merely because their production would incriminate the custodian or some individual member of the association. In the cases above cited it has been held that failure to produce books and papers owned by a corporation may not be excused because the production would incriminate the individual custodian. If corporations are members of a voluntary association, they have a proprietary interest in its records, which relate to the transactions of the corporations, and are subject to visitatorial examination by the State, and that right may be insisted on notwithstanding individual members of the association as well as custodians of the records may be incriminated. If individuals become associated with corporations in that way they assume the risk of having the custodian of the records required to produce them. But it may be that in this case it is not necessary to go beyond the proposition that the custodian may not maintain the privilege if all the members of the association are corporations. The plaintiff in error disobeyed the subpoena and the order of the court. We think the burden was shifted to him to present a valid excuse, and he failed to sustain the burden when he failed to show that the papers called for did not belong to corporations. The character of the members of the association was a matter peculiarly within his knowledge. If the burden was

on the United States to negative the existence of facts from which the privilege would arise, then the judgment can not be sustained.

Respectfully submitted,

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DECEMBER, 1927.

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